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In the Supreme Court of the United States

ZOYA ATAMIRZAYEVA, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Federal Circuit err in adopting a categorical rule that bars foreign nationals from seeking compensation under the Takings Clause for property taken by the United States overseas unless they have some preexisting substantial connection with the United States?

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MISCELLANEOUS

Lori F. Damrosch, et al., *International Law: Cases and Materials* (4th ed. 2001) 15

OPINIONS BELOW

The opinion of the United States Court of Federal Claims (Appendix ("App.") B, 21-45) is reported at 77 Fed. Cl. 378 (2007). The opinion of the United States Court of Appeals for the Federal Circuit (App. A, 1-20) is reported at 524 F.3d 1320 (Fed. Cir. 2008).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 7, 2008. The order of the Federal Circuit denying rehearing *en banc* (App. D, 47-48) was entered on August 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

United States Constitution, Amendment V, reprinted at App. C, 46.

STATEMENT OF THE CASE

Petitioner, Mrs. Zoya Atamirzayeva, is a citizen and resident of the Republic of Uzbekistan. She had no significant connection to the United States until the U.S. government ordered her property destroyed to improve security around the U.S. Embassy in Uzbekistan. Mrs. Atamirzayeva brought this action seeking just compensation from the United States for the taking of her property.

A. The Government's Taking of Petitioner's Property

Until December of 1999, Mrs. Atamirzayeva owned and operated a successful cafeteria adjacent to the United States Embassy in Tashkent, the capital of Uzbekistan.[1]

In November 1999, in the wake of the embassy bombings in Kenya and Tanzania, Congress passed the Secure Embassy Construction and Counterterrorism Act of 1999, 22 U.S.C. § 4865 nt., Pub. L. No. 106-113 (1999) (the "Secure Embassy Act"). The Secure Embassy Act called for $4.6 billion to be spent over five years to bring U.S. diplomatic facilities into compliance with security requirements. The Act specifically envisioned the payment of compensation to acquire "any residences or other structures located in close physical proximity" to diplomatic facilities to the extent such acquisitions were necessary for security.

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[1] The facts cited herein are drawn from the Petitioner's Complaint, which can be found at Appendix E, 49-60. These facts must be accepted as true for the purposes of this Petition. *E.g., Hishon v. King & Spalding*, 467 U.S. 67, 73 (1984).

The U.S. Embassy in Tashkent was specifically targeted for security renovations. Indeed, then-Secretary of State Madeleine Albright called the embassy "the poster child" for needed security improvements.

On December 20, 1999 – just weeks after the passage of the Secure Embassy Act – the United States demanded that the Uzbek government extend the security perimeters around the U.S. Embassy. The United States specifically demanded that Mrs. Atamirzayeva's cafeteria be demolished "for the sake of the security of the U.S. Embassy."

On December 23, 1999, Uzbek authorities forcibly expelled Mrs. Atamirzayeva from her cafeteria. Under the supervision of U.S. officials, who were physically present at the scene, the Uzbek authorities demolished the cafeteria and constructed a security checkpoint for the U.S. Embassy in its place.

Mrs. Atamirzayeva has never been compensated for the taking and destruction of her property. She and her family approached both the government of Uzbekistan and the U.S. Embassy seeking compensation for her loss. Both requests were denied.

The Uzbek government refused to compensate Mrs. Atamirzayeva because it had taken the property at the direction and for the benefit of the United States. The Uzbek authorities told Mrs. Atamirzayeva that the property was being used "for the security improvements of the Embassy" and implied any responsibility for compensation rested with the United States.

The United States, for its part, met with Mrs. Atamirzayeva and her family over the course of sev-

eral months to discuss compensation for the seized property. Ultimately, however, the United States denied compensation, taking the position that, even if it had taken Mrs. Atamirzayeva's property, the United States has no obligation to compensate foreign nationals for property taken outside the United States.

To date, Mrs. Atamirzayeva has received no compensation from any source for the destruction of her cafeteria.

B. Summary of Proceedings Below

On November 20, 2005, Mrs. Atamirzayeva filed suit against the United States in the Court of Federal Claims seeking just compensation under the Fifth Amendment. Jurisdiction was based on 28 U.S.C. § 1491, which gives the Court of Federal Claims jurisdiction to hear suits against the United States arising out of the Constitution.

On June 16, 2006, Respondent moved for judgment on the pleadings, contending that Mrs. Atamirzayeva cannot assert a claim under the Fifth Amendment because she is a foreign national whose property was taken in a foreign country.

1. Court of Federal Claims

The Court of Federal Claims granted judgment on the pleadings on June 20, 2007. *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007). In dismissing Mrs. Atamirzayeva's claim, Chief Judge Edward J. Damich acknowledged that nonresident aliens can assert claims under the Fifth Amendment if their property is taken within the United States. *Id.* at 385 (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)). Judge Damich also ac-

knowledged that American citizens can assert claims under the Fifth Amendment if the United States takes their property abroad. *Id.* (citing *Seery v. United States*, 130 Ct. Cl. 481 (1955)). Judge Damich noted, however, that neither the Supreme Court nor the Federal Circuit had addressed whether a nonresident alien has standing to "invoke the Takings Clause regarding property outside of the United States." *Id.* at 385.

Finding "no clear precedent" on the extraterritorial application of the Takings Clause, Judge Damich relied on the Court's opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Warrant Clause of the Fourth Amendment does not protect nonresident aliens from warrantless searches outside of the United States undertaken with the approval of the foreign authorities. In reaching that decision, the Court noted: "Respondent is an alien who has had no previous significant voluntary connection with the United States." *Id.* at 271. Based on that language, Judge Damich concluded that nonresident aliens only have standing to assert claims under the Fifth Amendment for property taken outside of the United States if they have preexisting "substantial connections" with the United States. *Id.* at 385. Because Mrs. Atamirzayeva is a citizen and resident of Uzbekistan and her property was located in Tashkent, Judge Damich concluded that she lacked "substantial connections" to the United States and has no constitutional right to just compensation. *Id.* at 387.

2. Federal Circuit

The Federal Circuit affirmed. *Atamirzayeva v. United States*, 524 F.3d 1320, 1322 (Fed. Cir. 2008).

Noting the absence of Supreme Court precedent on this precise question, the Federal Circuit engaged in a lengthy review of this Court's prior decisions regarding the extraterritorial application of other constitutional provisions.

First, citing *Ross v. McIntyre*, 140 U.S. 453 (1891), the Federal Circuit concluded that this Court "has long taken the view that the Constitution is subject to territorial limitations." 524 F.3d at 1322. It quoted the Court's statement in that case that: "The guarantees [the Constitution] affords . . . apply only to citizens and others within the United States . . . and not to residents or temporary sojourners abroad." *Id.*

The Federal Circuit next examined the *Insular Cases*, in which it found that the Court had reached "a similar result," stating that "[i]n those cases, the Supreme Court concluded that specific constitutional provisions did not extend to unincorporated territories of the United States . . . ." *Id.* at 1322-23. The Federal Circuit quoted and emphasized the statement from *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) that *"neither the Constitution nor the laws passed in pursuance of it have any force in a foreign territory unless in respect of our own citizens."* 524 F.3d at 1323.

The Federal Circuit concluded that the Court had "continued to follow that approach in *Johnson v. Eisentrager*," 339 U.S. 763 (1950), holding "that the Fifth and Sixth Amendments do not confer rights on any enemy aliens seeking habeas corpus relief." 524 F.3d at 1324.

The Federal Circuit acknowledged that in *Reid v. Covert*, 354 U.S. 1 (1957), the Court had "adopted a more expansive view" of the extraterritorial application of the Constitution, but concluded that, in doing so, the Court had "relied on the United States citizenship of the habeas corpus petitioners" in that case. 524 F.3d at 1323-24.

Finally, the Federal Circuit relied on *Verdugo-Urquidez* and statements in the Court's opinion rejecting "the view that every constitutional provision applies wherever the United States government exercises its power," and emphatically rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 1325 (internal quotation marks omitted).

The Federal Circuit also cited to the Court's statement that, unlike the aliens who had been extended constitutional rights in other cases, Mr. Verdugo-Urquidez had "'no previously significant voluntary connection with the United States.'" The Federal Circuit relied on that statement to distinguish *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), a Court of Claims precedent that was binding on the Federal Circuit and that had been cited with approval by this Court in *Reid v. Covert*, 354 U.S. at 8 & n.10.

The Court of Claims had unanimously held in *Turney* that a Philippine corporation could bring an action under the Takings Clause for the taking of its property in the Philippines. The Federal Circuit concluded that a holding that the decision in *Turney* allowed foreign nationals to bring claims for property taken abroad "would be in tension with the Su-

preme Court's subsequent decision in *Verdugo-Urquidez.*" 524 F.3d at 1328. The Federal Circuit therefore distinguished *Turney,* finding that the Philippine corporation there had three significant previous connections to the United States: first, it had originally been formed and was previously owned by two U.S. citizens; second, it had acquired its interest in the later-seized property from U.S. citizens; and, third, when the Philippine corporation entered liquidation, a U.S. citizen was appointed as the liquidating trustee. Because Mrs. Atamirzayeva had no such previous "substantial connection" with the United States, the Federal Circuit held that she was not entitled to pursue a Takings Clause action for the taking of her property.

REASONS FOR GRANTING THE PETITION

This case raises important questions regarding the ability of the United States government to take property abroad without paying just compensation.[2] In its decision below, the Federal Circuit established a rigid rule barring foreign nationals from seeking compensation under the Takings Clause for property

[2] This case raises no questions regarding the need of the United States to pay compensation for property taken, damaged or destroyed during wartime. It is clear that the United States has no such obligations. Indeed, this Court has held that the destruction of property in a time of war does not constitute a taking. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1953) (holding that the Army's destruction of a petroleum refinery in the Philippines during the Second World War was not a Fifth Amendment taking and did not require compensation); *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909) (holding that the Army's destruction of a building complex during the Spanish-American War was not a Fifth Amendment taking and did not require compensation).

taken by the United States overseas, unless they have some preexisting substantial connection with the United States. Absent review by this Court, the Federal Circuit's rule will stand as the law of the land because the U.S. Court of Federal Claims, which is bound by the Federal Circuit's decision, has exclusive jurisdiction over all takings claims for more than $10,000. No other Circuit Court will have an opportunity to examine this issue.

The Federal Circuit's decision was reached prior to and is inconsistent with this Court's recent decision in *Boumediene v. Bush*, 533 U.S. __, 128 S. Ct. 2229 (2008). The Court in *Boumediene* rejected the application of any "rigid and abstract" territorial limitation on the application of the Constitution. It also effectively rejected the requirement, adopted by the court below, that foreign nationals must have some prior "voluntary substantial connection" with the United States to assert constitutional rights. Instead, the Court adopted "a functional approach," and emphasized that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 2258.

The Federal Circuit's decision, if allowed to stand, would create an arbitrary rule making the extraterritorial application of the Takings Clause turn on pure happenstance. Foreign nationals would be allowed to obtain just compensation for the taking of their property abroad if they happened, fortuitously, to have some unrelated connection with the United States, whether or not the award of compensation to them would be impractical and anomalous in the circumstances. At the same time, other aliens lacking such preexisting connections would be denied just

compensation, even when no inconveniences or practical difficulties exist.

The Court should thus grant *certiorari* to clarify the law in this area and establish that (i) no rigid rule applies to the extraterritorial application of the Takings Clause to foreign nationals whose property is taken abroad, and (ii) the extraterritorial application of the Takings Clause should be assessed in accordance with the factors set out in *Boumediene.*

1. The Federal Circuit's Decision Is in Direct Conflict with *Boumediene*

The Federal Circuit issued its decision in *Atamirzayeva* prior to this Court's decision in *Boumediene.*[3] There is no doubt that the Federal Circuit's decision is in direct conflict with *Boumediene.* Its reading of the prior cases – the *Insular Cases, Johnson v. Eisentrager, Reid v. Covert* – and the conclusions the Federal Circuit drew from those cases are all directly contrary to the reading and conclusions drawn by this Court in *Boumediene.* In *Boumediene*, this Court emphatically rejected any "rigid and abstract rule[s] for determining where constitutional guarantees extend." 128 S. Ct. at 2255. It stressed that questions regarding the extraterritorial application of the Constitution "turn on objective factors and practical concerns, not formalism." *Id.*

The Court also rejected the same argument that the government makes and which the Federal Circuit adopted here – that foreign nationals abroad must have a preexisting substantial relationship

[3] Although the Federal Circuit issued its decision prior to *Boumediene*, it denied a petition for rehearing following the release of *Boumediene. See* App. D, 47-48.

with the United States as a precondition for asserting constitutional rights. The Court in *Boumediene* made no attempt to determine whether the Guantanamo detainees had any relationship with the United States prior to their detention. Indeed, although the detainees likely lacked such relationships, the Court nonetheless found that they had a constitutionally protected right to habeas corpus.

Under these circumstances – where the Federal Circuit has misinterpreted more than a century of Supreme Court precedent and fashioned a standard for the extraterritorial application of the Constitution at odds with the recent decision in *Boumediene* – the Court should grant *certiorari* and make clear that application of the Takings Clause abroad depends on objective factors and practical concerns, not on whether a particular claimant fortuitously happens to have a previous substantial connection with the United States.

The need for *certiorari* is particularly pressing given that takings claims for more than $10,000 must be brought in the U.S. Court of Federal Claims. Absent review by this Court, the Federal Circuit's departure from *Boumediene* will become the law of the land with respect to the extraterritorial application of the Takings Clause.

2. The Federal Circuit's Decision Creates an Arbitrary Standard for Extension of Constitutional Rights

The Federal Circuit's "prior substantial connections" test creates an arbitrary standard for the extraterritorial application of the Constitution that would be simultaneously both too broad and too narrow.

It is too broad because it depends solely on the prior relationship of the nonresident alien to the United States without regard to the practical considerations associated with applying a particular constitutional provision abroad. Aliens abroad with prior substantial connections with the United States would be entitled to constitutional protections, while those without such connections would not. Under that test, if Mr. Verdugo-Urquidez had established "substantial connections" with the United States prior to his arrest, he would at least arguably have been entitled to the protection of the Warrant Clause with respect to searches of his residences in Mexico, even if enforcement of that protection were "impractical and anomalous." *Verdugo-Urquidez*, 494 U.S. at 278.

The "prior substantial connections" test is simultaneously too narrow. It turns on *prior* connections with the United States that have no necessary relationship to the constitutional right that the nonresident alien seeks to assert. For example, if the "substantial connections" test were applied to the detainees at Guantanamo Bay, a detainee's constitutional habeas corpus right would depend on whether that particular detainee had substantial connections with the United States before being detained.[4] Rather than focusing on the practical considerations of affording detainees specified constitutional protections, an individual petitioner's rights would depend on

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[4] As *Verdugo-Urquidez* makes clear, being detained by the United States would not alone count as a "*previous* significant *voluntary* connection" because such detainment is neither prior to the United States' allegedly unconstitutional act nor voluntary on Mr. Verdugo-Urquidez's part. 494 U.S. at 271-72.

such arbitrary factors as whether he went to college in Massachusetts or vacationed at Disney World.

The arbitrariness of the Federal Circuit's test becomes clear when applied to this case. Based on the distinctions the Court drew to distinguish the *Turney* case, it appears that Mrs. Atamirzayeva would have been entitled to seek just compensation for the taking of her cafeteria (i) if she had a prior partner or a former shareholder in the corporation owning the cafeteria who was a U.S. citizen, or (ii) if she had acquired the cafeteria originally from a U.S. citizen, or (iii) if she appointed a U.S. trustee to pursue her claim. One wonders whether it would have been sufficient under the Federal Circuit's test if Mrs. Atamirzayeva had asserted in her complaint that many of the clients at her cafeteria were American personnel from the Embassy. None of these things, of course, has anything to do with the taking of her property or with the practical issues involved in determining whether the taking occurred, what the value of her property was and whether compensation could be paid without inconvenience. Those are the issues that matter.

The arbitrary standard set by the Federal Circuit for application of the Takings Clause abroad should not be allowed to stand as the law of the land. The Court should grant *certiorari* to make clear that the extraterritorial application of the Constitution does not depend on such fortuitous happenstance.

3. Extraterritorial Application of the Takings Clause Is Not Impractical and Anomalous

In 1953, following extensive argument by Thurmond Arnold for the petitioner and Warren Burger for the U.S. government, the Court of Claims ruled unanimously that a Philippine corporation could

bring an action under the Takings Clause for the taking of its property in the Philippines. In reaching that decision, the court did not rely on the happenstance that the Philippine corporation previously had a U.S. shareholder, or that the property that was taken had originally been acquired from U.S. citizens, or that a U.S. trustee had been appointed to pursue its claims. Rather, the court concluded in straightforward language that the Takings Clause applied because "the right to just compensation for property taken . . . can, without inconvenience or practical difficulty, be applied to a taking abroad." *Turney*, 115 F. Supp. at 464.

That has been the law ever since, and it has been applied without practical difficulty. Indeed, the United States regularly pays compensation when it acquires property from alien-friends outside of its borders in times of peace.[5] The Secure Embassy Act alone allocated more than $4 billion that could be used for "the acquisition of United States diplomatic facilities and, if necessary, any residences or other structures located in close physical proximity to such facilities." 22 U.S.C. § 4865 nt., Pub. L. No. 106-113, § 604.

In addition to *Turney*, a number of lower court decisions have analyzed international takings claims on the merits. *See, e.g., Juda v. United States*, 6 Cl. Ct. 441, 455-58 (1984) (holding that noncitizens could invoke the Takings Clause for property located in the

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[5] As mentioned, overturning *Atamirzayeva* would not open the door to claims against the United States by foreign nationals whose property is damaged or destroyed during a time of war. *See, supra* n.2. Mrs. Atamirzayeva is an alien-friend and the United States and Uzbekistan are in a state of peace.

Trust Islands); *Nitol v. United States*, 7 Cl. Ct. 405, 415 (1985) (same); *Porter v. United States*, 496 F.2d 583, 591 (Cl. Ct. 1974) (rejecting as "overly rigid" the government's argument that the Takings Clause does not apply to property outside the United States and finding no taking by the government); *Fleming v. United States*, 352 F.2d 533, 536-37 (Ct. Cl. 1965) (applying Takings Clause analysis and finding no taking by the government).[6] These decisions demonstrate that there is nothing necessarily impractical about applying the Takings Clause extraterritorially.

Finally, the practical concerns that prevented extraterritorial application of the Warrant Clause in *Verdugo-Urquidez* do not exist with respect to the Takings Clause. For example, paying just compensation does not require the availability of a local judge or magistrate, nor would it offend conceptions of privacy. Although the taking itself may create a conflict with the host country, the payment of compensation would not.

* * *

There may be circumstances in which the application of the Takings Clause to the seizure of property by the United States would be impractical and

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[6] These cases are often referred to as the "Trust Island" cases. The claimants in these cases were not citizens of the United States and their properties were not located in the United States. Rather, each trust territory was "administered by an administering authority" under an agreement between that authority and the United Nations which "provided for supervision by the United Nations Trusteeship Council." Lori F. Damrosch, et al., *International Law: Cases and Materials* 283 (4th ed. 2001). Under this system, "[t]hese territories did not become part of the territory of the administering power, nor did the inhabitants acquire the nationality of the administering state." *Id.* at 283-84.

anomalous. But that should be the standard, not whether the petitioner whose property was taken has some fortuitous prior connection with the United States. The Court should grant *certiorari* to clarify the law.

CONCLUSION

For the reasons stated above, the Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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NOVEMBER 3, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, FEDERAL CIRCUIT,

May 7, 2008

No. 2007-5159.

ZOYA ATAMIRZAYEVA,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Before MAYER, BRYSON, and GAJARSA, Circuit Judges.

BRYSON, *Circuit Judge*

Zoya Atamirzayeva filed a claim in the Court of Federal Claims seeking compensation under the Fifth Amendment to the U.S. Constitution for an alleged taking of property she owned in Uzbekistan.

The Court of Federal Claims dismissed Ms. Atamirzayeva's claim on the pleadings because she did not plead any connection to the United States that would entitle her to relief under the Fifth Amendment's Takings Clause. Ms. Atamirzayeva appeals on the ground that the Fifth Amendment does not require a person deprived of property to have any connection to the United States in order to be entitled to just compensation for a taking that is attributable to the U.S. government. We affirm.

I

The Court of Federal Claims entered judgment on the pleadings. Therefore, "each of the well-pled allegations in the complaints is assumed to be correct, and the court must indulge all reasonable inferences in favor of the plaintiffs." *Atlas Corp. v. United States,* 895 F.2d 745, 749 (Fed. Cir. 1990).

According to her allegations, Ms. Atamirzayeva is a citizen of the Republic of Uzbekistan. She resides in Tashkent, the capital of Uzbekistan. Prior to the events that are the subject of her claim, she was the sole owner of a cafeteria located on property next to the U.S. Embassy in Tashkent. The property on which her cafeteria was located was owned by the Republic of Uzbekistan, but Ms. Atamirzayeva owned the buildings on the property.

Ms. Atamirzayeva alleges that in December 1999 officials at the U.S. Embassy made a verbal demand to local authorities in Tashkent that they destroy Ms. Atamirzayeva's cafeteria in order to increase the security of the U.S. Embassy. The following day, lo-

cal authorities forcibly expelled Ms. Atamirzayeva from her cafeteria, then destroyed it while officials from the U.S. Embassy oversaw the demolition. Ms. Atamirzayeva sought compensation from local authorities and from the U.S. Embassy, but those efforts were unsuccessful. She then initiated this takings action in the Court of Federal Claims.

In its motion for judgment on the pleadings, the government argued that Ms. Atamirzayeva has no claim under the Fifth Amendment because she is a foreign national whose taken property was in a foreign country. The trial court agreed and dismissed Ms. Atamirzayeva's claim because she pleaded no connection to the United States that would entitle her to compensation under the Takings Clause.

II

The sole question presented on appeal is whether a foreign citizen with no connection to the United States has a right to just compensation under the Fifth Amendment for a taking of property that occurs in a foreign country. Ms. Atamirzayeva argues that the Court of Claims answered that question affirmatively in *Turney v. United States,* 126 Ct. Cl. 202, 115 F. Supp. 457, 464 (1953), when it extended the Takings Clause to a claim by a Philippine corporation for property taken in the Philippines. Ms. Atamirzayeva asserts that under the authority of that decision, the trial court's dismissal order must be reversed. Before we address the scope of the Court of Claims' decision in *Turney,* we turn first to the Supreme Court cases involving the extraterritorial application of constitutional provisions.

A

The Supreme Court has long taken the view that the Constitution is subject to territorial limitations. In *Ross v. McIntyre,* 140 U.S. 453, 11 S. Ct. 897, 35 L. Ed. 581 (1891), the Court rejected a habeas corpus petitioner's claim that his conviction by a United States consular court in Japan violated the Sixth Amendment right to a jury trial. The Court stated:

> By the constitution a government is ordained and established "for the United States of America," and not for countries outside their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States,* 138 U.S. 157, 181, 11 S. Ct. 268, 34 L. Ed. 906 [(1891)]. The constitution can have no operation in another country.

Ross, 140 U.S. at 464, 11 S. Ct. 897. The Court further reasoned that giving extraterritorial effect to the right to a jury trial "would be impracticable from the impossibility of obtaining a competent grand or petit jury." *Id.*

The Supreme Court reached a similar result in

the *Insular Cases,* a series of cases addressing Congress's authority under Article IV, § 3, cl. 2, of the Constitution, which grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." In those cases, the Supreme Court concluded that specific constitutional provisions did not extend to unincorporated territories of the United States and therefore did not limit Congress's authority under Article IV. *See Downes v. Bidwell,* 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901) (revenue clauses); *Dorr v. United States,* 195 U.S. 138, 24 S. Ct. 808, 49 L. Ed. 128 (1904) (right to trial by jury); *Balzac v. Porto Rico,* 258 U.S. 298, 42 S. Ct. 343, 66 L. Ed. 627 (1922) (same); *see also Hawaii v. Mankichi,* 190 U.S. 197, 23 S. Ct. 787, 47 L. Ed. 1016 (1903) (jury and grand jury provisions of Fifth and Sixth Amendments not given effect after annexation).

In *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936), the Court expressed a strict territorial view of the Constitution when it addressed the differences between the federal government's authority over internal affairs and foreign affairs:

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the

> federal government as necessary concomitants of nationality. *Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens* ... and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.

Id. at 318, 57 S. Ct. 216 (emphasis added).

The Court continued to follow that approach in *Johnson v. Eisentrager,* 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), in which the Court held that the Fifth and Sixth Amendments do not confer rights on enemy aliens seeking habeas corpus relief. Citing *Downes,* the Court warned against disregarding territorial limits on the application of the Constitution by extending to enemy aliens constitutional protections that are not provided to U.S. citizens serving in the military:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes v. Bidwell,* 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088.... None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Eisentrager, 339 U.S. at 784-85, 70 S. Ct. 936.

In *Reid v. Covert,* 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), a plurality of the Court adopted a more expansive view of the extraterritorial application of constitutional protections involved the convictions by military tribunals of two American women who had murdered their husbands while living at military bases abroad, one in Japan and one in England. Seeking habeas corpus relief, the two women argued that their trials violated Article III, Section 2, of the Constitution and the Fifth and Sixth Amendments. The Court initially ruled against them, relying on Ross and the *Insular Cases* for the proposition that "the Constitution does not require trial before an Article III court in a foreign country for offenses committed there by an American citizen and that Congress may establish legislative courts for this purpose." *Kinsella v. Krueger,* 351 U.S. 470, 476, 76 S. Ct. 886, 100 L. Ed. 1342 (1956); *accord Reid v. Covert,* 351 U.S. 487, 488, 76 S. Ct. 880, 100 L. Ed. 1352 (1956) (adopting holding of *Kinsella*). On rehearing, however, the Court accepted their arguments and held that, as U.S. civilians being tried for capital offenses, the two women were constitutionally entitled to civilian trials. *Reid,* 354 U.S. at 19, 77 S. Ct. 1222.

The plurality opinion in Reid refused to adopt a comprehensive territorial limitation on the scope of the Constitution and proposed that the holdings of Ross and the *Insular Cases* be limited. The plurality began by rejecting "the idea that when the United States acts against citizens abroad it can do so free of

the Bill of Rights." *Reid,* 354 U.S. at 5, 77 S. Ct. 1222. Citing *Turney* among other cases, the plurality then stated that the Supreme Court and other federal courts "have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States." *Id.* at 8 & n. 10, 77 S. Ct. 1222. The plurality observed that Congress had "recently buried the consular system of trying Americans," and therefore stated that, "[a]t best, the Ross case should be left as a relic from a different era." *Id.* at 12, 77 S. Ct. 1222. The Reid plurality likewise rejected the reasoning of the *Insular Cases*:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

354 U.S. at 14, 77 S. Ct. 1222. The plurality did not, however, adopt an unlimited view of the extraterritorial scope of the constitutional provisions at issue in that case. Instead, it relied on the United States citizenship of the habeas corpus petitioners in *Reid* to distinguish the *Insular Cases*, stating that those cases "involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship." *Id.*

The two justices who concurred in the result in Reid would have further limited the Court's holding. Justice Frankfurter would have specifically limited the holding to capital cases. In addition, he suggested that the Court did not need to reject the holdings in *Ross* and the *Insular Cases* to the degree that the plurality did. *Reid,* 354 U.S. at 49, 77 S. Ct. 1222 (Frankfurter, J., concurring in the result).

In a separate concurrence, Justice Harlan agreed that military tribunals could not be used to try a civilian in a capital case, but he also agreed with Justice Frankfurter that *Ross* and the *Insular Cases* should not be disregarded as "historical anomalies." *Reid,* 354 U.S. at 65-67, 77 S. Ct. 1222 (Harlan, J., concurring in the result). Those cases, he contended, should be understood as teaching that "there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous." *Id.* In determining whether Congress has acted in accordance with the Constitution, Justice Harlan wrote, the pertinent question is "*which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." *Id.* at 75 (emphasis in original).

Thirty-three years later, in *United States v. Verdugo-Urquidez,* 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990), the Supreme Court took a restrictive view of the extraterritorial application of the

Fourth Amendment's prohibition against unreasonable searches and seizures. Verdugo-Urquidez, a Mexican national, was charged with a number of narcotics-related offenses. Before the district court, he moved to suppress evidence seized during searches of his residences in Mexico by officials from the Drug Enforcement Administration. *Id.* at 262-63, 110 S. Ct. 1056. The district court granted his motion and, on appeal, the Ninth Circuit affirmed, relying on *Reid* and *INS v. Lopez-Mendoza,* 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), a case in which the Supreme Court assumed that the protections of the Fourth Amendment extended to illegal aliens in the United States. The Supreme Court reversed the Ninth Circuit's decision, stating that "it was never suggested that the [Fourth Amendment] was intended to restrain the actions of the Federal Government against aliens outside of the United States." *Verdugo-Urquidez,* 494 U.S. at 266, 110 S. Ct. 1056.

Addressing the court of appeals' "global view of the application of the Constitution," the Court in *Verdugo-Urquidez* rejected "the view that every constitutional provision applies wherever the United States Government exercises its power." 494 U.S. at 268-69, 110 S. Ct. 1056. The Court noted that in *Johnson v. Eisentrager* it had "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," and it added that the Court's rejection of extraterritorial application of the Fifth Amendment in *Eisentrager* was "emphatic." *Verdugo-Urquidez,* 494 U.S. at 269, 110 S. Ct. 1056.

Addressing the decision in *Reid v. Covert,* the Court explicitly rejected the extension of that decision to non-citizens abroad:

> Respondent urges that we interpret [*Reid*] to mean that federal officials are constrained by the Fourth Amendment wherever and against whomever they act. But the holding of *Reid* stands for no such sweeping proposition: it decided that United States citizens stationed abroad could invoke the protections of the Fifth and Sixth Amendments.... Since respondent is not a United States citizen, he can derive no comfort from the Reid holding.

Verdugo-Urquidez, 494 U.S. at 270, 110 S. Ct. 1056. The Court also distinguished several other cases that had extended constitutional rights to aliens, including *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 51 S. Ct. 229, 75 L. Ed. 473 (1931), which held that a Russian corporation was entitled to just compensation when the federal government appropriated two vessels being built in the United States pursuant to a contract with the Russian corporation. The Court characterized those cases as involving aliens who had "come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez,* 494 U.S. at 271, 110 S. Ct. 1056. Those cases did not support Verdugo-Urquidez's argument, the Court held, because he had "no previous significant voluntary connection with the United States." *Id.*

Justice Kennedy joined the majority opinion and

also wrote a separate concurrence. In his opinion, Justice Kennedy first noted the importance, in cases involving the extraterritorial application of the Constitution, of the distinction between citizens and aliens, a distinction that he said "follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Verdugo-Urquidez,* 494 U.S. at 275, 110 S. Ct. 1056 (Kennedy, J., concurring). He explained, however, that he did not place any weight on the reference to "the people" in the Fourth Amendment as a textual basis for limiting the application of that provision. Instead, focusing on whether the particular constitutional standard at issue should apply to an alien in a foreign country, Justice Kennedy observed that, "in addition to the other persuasive justifications stated by the Court," there were several practical considerations that argued against extraterritorial application of the Fourth Amendment: "The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Id.* at 278, 110 S. Ct. 1056. He added that the rights of a citizen, "to whom the United States has continuing obligations, are not presented by this case." *Id.*

B

In the case before us, the trial court relied on the "substantial connection test" derived from *Verdugo-Urquidez* and held that Ms. Atamirzayeva did not

have a right to relief under the Fifth Amendment because she did not plead any connection to the United States. Ms. Atamirzayeva does not argue that she has pleaded a significant connection to the United States. Rather, she argues that the Court of Claims' 1953 decision in *Turney v. United States,* 126 Ct. Cl. 202, 115 F. Supp. 457, does not require a nonresident alien to show any connection to the United States in order to assert a takings claim for overseas property taken by the United States. We agree that the scope of the court's ruling in *Turney* is of central importance here. We therefore turn to a close examination of the underlying facts and the legal issue decided in that case.

In *Turney,* the Court of Claims allowed a Philippine corporation to bring an action against the United States for an alleged taking of property located in the Philippines. The corporation's claim arose out of events that took place shortly after the liberation of the Philippines from Japanese occupation near the end of World War II. To provide aid to the new country, the United States transferred to the Philippine government the Leyte Air Depot and all surplus property located at the depot. At an auction for the account of the Philippine government, Paul Ranslow and Vernon Childers, two U.S. citizens who had served in the Air Force during the war, submitted a bid for the depot's surplus property. Their bid was accepted, and they entered into a contract to purchase the property.

To fund the purchase, Ranslow and Childers entered into an agreement with two residents of Hong Kong. The Hong Kong residents contributed most of

the funds, and in return Ranslow and Childers agreed to assign their rights under the contract for the surplus property to a newly formed corporation. Ranslow and Childers were to manage the corporation's sale of the surplus property and would receive 15 percent of the corporation's profits.

Soon after the corporation was formed, employees hired by the corporation discovered that the Air Force had mistakenly left classified military radar equipment at the depot. After learning of the mistake, Childers proposed that the corporation sell the radar equipment to the Chinese Nationalist Air Forces. Childers sought clearance from the American Military Attaché's staff in Nanking, which informed authorities in the United States that the radar equipment remained at the depot. Subsequently, United States Air Force officials initiated negotiations with Childers for the return of the radar equipment, but the parties could not reach an agreement.

United States representatives then made a request to the Chief of the Executive Offices of the President of the Philippines, Mr. Abello, to have an embargo placed on the exportation of any of the surplus property at the Leyte Air Depot. Mr. Abello complied. In response, Ranslow and Childers agreed to allow the radar equipment to be segregated from the other surplus property if Mr. Abello would arrange for the embargo on the remaining surplus property to be lifted. After the radar equipment was segregated, the corporation entered into an agreement to have the equipment returned to the United States. The agreement included a statement by the

corporation that it intended to file a claim against the United States for losses in connection with the return of the equipment. The corporation subsequently filed suit against the United States in the Court of Claims for breach of contract and for a Fifth Amendment taking. The shareholders of the corporation then voted to liquidate the corporation, and Edward Turney, a United States citizen, was appointed as the liquidating trustee and was designated the plaintiff in the action against the United States.

Addressing the corporation's takings claim, the Court of Claims analyzed several issues. First, it concluded that title to the radar equipment passed first to Ranslow and Childers, and subsequently to the corporation. Next, the court concluded that the United States' repossession of the radar equipment constituted a taking, even though the United States did not impose the embargo on the surplus property. The court reached that conclusion by reasoning that the Philippine government "readily complied" with the United States' request to place an embargo on the radar equipment because the two governments shared a close relationship at that time. The embargo effected the taking, the court held, because it "put irresistible pressure upon the corporation to come to terms with the United States Army." 115 F. Supp. at 464.

The court then reached the question whether the Fifth Amendment provides non-citizens a right to just compensation for takings that occur outside of the United States. In a paragraph, the court rejected the government's argument that the Fifth Amendment does not apply extraterritorially. The court ob-

served that the Takings Clause was applied to a taking of a resident alien's property located in the United States in *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 51 S. Ct. 229, 75 L. Ed. 473 (1931) (Russian corporation), and to the taking of an American citizen's property abroad in *Wiggins v. United States,* 3 Ct. Cl. 412 (1867) (taking in Nicaragua). In rejecting the government's position, the court distinguished the Supreme Court's decision in *Ross* that the right to a jury trial did not extend to a seaman serving on an American vessel who was convicted of murder by a consular court in Japan. The court reasoned that cases such as *Ross* "do not mean that other constitutional rights, such as the right to just compensation for property taken, which can, without inconvenience or practical difficulty, be applied to a taking abroad, should not be so applied." *Turney,* 115 F. Supp. at 464. While noting that there is "no decision directly in point," the court concluded that "plaintiff's contention is sound." *Id.*

Ms. Atamirzayeva argues that the Court of Claims in *Turney* established a rule, binding on this court, that the Fifth Amendment protects the foreign property interests of non-resident aliens regardless of their connections to the United States. Ms. Atamirzayeva is correct that *Turney* is binding precedent for this court. In fact, in *El-Shifa Pharmaceutical Industries Co. v. United States,* 378 F.3d 1346 (Fed. Cir. 2004), we stated that overruling *Turney* would require an en banc decision by this court. In the *El-Shifa* case, however, we found it unnecessary to decide whether *Turney* "enjoys any continuing vitality after *Verdugo-Urquidez,*" and we therefore did not address that question. Instead, we dis-

posed of the plaintiff's claim in that case by holding that the alleged taking presented a nonjusticiable political question. 378 F.3d at 1352.

While *Turney* is binding on us, we do not believe that it is dispositive of Ms. Atamirzayeva's claim. The Philippine corporation that was the claimant in *Turney* had three significant connections to the United States. First, the corporation had been formed by two United States citizens. Second, the corporation received its ownership interest in the surplus property by assignment from those United States citizens. Third, after liquidation of the corporation, a United States citizen was appointed as the liquidating trustee and the plaintiff in the Court of Claims action. Ms. Atamirzayeva, by contrast, has not pleaded any relationship, business or otherwise, with the United States. As pleaded, her only connections with the United States are that her cafeteria was adjacent to the U.S. Embassy and that embassy officials directed the seizure. Her relationship with the United States is therefore not analogous to the relationship between the claimant corporation and the United States in *Turney*.

To be sure, the court in *Turney* did not state that the plaintiff was required to demonstrate any connection with the United States. In light of the facts of the case, however, we do not interpret the decision in *Turney* to have established a blanket rule that the Fifth Amendment protects the foreign property of citizens of every foreign country without regard to their connections with the United States. Such a rule would be far broader than any rule previously adopted by the Supreme Court for extraterritorial

application of any constitutional provision. Indeed, reading *Turney* in the manner that Ms. Atamirzayeva suggests would require us to infer from a single, brief paragraph of analysis a remarkable holding that would far exceed what the facts of the case required the court to decide and would be in tension with the Supreme Court's subsequent decision in *Verdugo-Urquidez.* The sounder approach is to treat the holding in *Turney* as limited to the proposition that providing a right to seek just compensation was appropriate under the facts of that case.

Ms. Atamirzayeva argues that under the approach advocated by Justice Kennedy in *Verdugo-Urquidez* and Justice Harlan in Reid, there is no reason to restrict the right to just compensation under the Fifth Amendment to those who have some connection to the United States. Those concurring opinions, however, do not provide the support that Ms. Atamirzayeva seeks to derive from them. Justice Kennedy emphasized in *Verdugo-Urquidez* the importance of the distinction between constitutional claims raised by citizens and those raised by "noncitizens who are beyond our territory." And Justice Harlan's opinion in *Reid* suggested that even civilian dependents of servicemen overseas might not be entitled to full Article III trials for non-capital offenses. Even the broad plurality opinion in *Reid* does not support Ms. Atamirzayeva's reading of *Turney.* Although the plurality in *Reid* cited *Turney* as a case in which a court applied a constitutional provision extraterritorially, it did so in the context of its discussion of constitutional rights that "protect Americans abroad." 354 U.S. at 9, 77 S. Ct. 1222.

Finally, Ms. Atamirzayeva relies on a line of cases referred to as the *Trust Island* Cases. *Nitol v. United States,* 7 Cl. Ct. 405 (1985); *Juda v. United States,* 6 Cl. Ct. 441 (1984); *Porter v. United States,* 204 Ct. Cl. 355, 496 F.2d 583 (1974); *Fleming v. United States,* 173 Ct. Cl. 426, 352 F.2d 533 (1965). The plaintiffs in those cases were Micronesians who alleged takings of property located in the Trust Territory of the Pacific Islands. In Porter, the court ruled against the plaintiffs because they did not show that a representative of the United States carried out the alleged taking. 496 F.2d at 591. In *Fleming,* the plaintiffs were found to have lacked legal title to the property at issue (trochus shells that were harvested illegally). 352 F.2d at 537. In *Juda* and *Nitol,* the court found that the plaintiffs were covered by the just compensation clause, but it reached that conclusion based on the "unique relationship" between the United States and the Trust Territory Government and the relationship between the United States and the plaintiffs. *Juda,* 6 Cl. Ct. at 457-58; *Nitol,* 7 Cl. Ct. at 414-15 (adopting holding of *Juda*). Those cases do not support the broad rule urged by Ms. Atamirzayeva, under which a plaintiff could pursue a Takings Clause action for a taking of property in a foreign country even in the absence of any allegation of a relationship between the plaintiff and the United States.[1] Because we believe that the Su-

[1] In her reply brief, Ms. Atamirzayeva cites the Supreme Court's recent decision in *Rasul v. Bush,* 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004). That case held that federal courts have jurisdiction to consider habeas corpus claims by aliens in United States custody in a location under exclusive United States control. Nothing in the Court's opinion in that case bears on the question whether Ms. Atamirzayeva may pur-

preme Court's decisions require such a relationship, and because nothing in *Turney* or any other decision binding on us holds that a takings action may be pursued in the absence of such a relationship, we affirm the decision of the trial court.

Each party shall bear its own costs for this appeal.

AFFIRMED.

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sue a takings claim based on actions by the United States in a foreign land.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

June 20, 2007

No. 05-1245 L.

ZOYA ATAMIRZAYEVA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION

DAMICH, Chief Judge.

This case is before the Court on Defendant's motion for judgment on the pleadings pursuant to RCFC 12(c) and RCFC 12(b)(6). Defendant alleges

that Plaintiff, a citizen and resident of Uzbekistan, lacks standing to seek compensation under the Fifth Amendment for the razing of her cafeteria by local Uzbek authorities—allegedly at the behest of United States Embassy officials—in Tashkent, the capital city. For the reasons stated below, the Court hereby GRANTS Defendant's motion.

BACKGROUND[1]

Plaintiff was the owner, since 1994, of a cafeteria called Feruza that was allegedly situated adjacent to the U.S. Embassy in Tashkent, Uzbekistan until December 1999, when it was destroyed by local Uzbek authorities. Compl. ¶ 1. Plaintiff alleges that the local Uzbek authorities seized Plaintiff's property and destroyed Feruza "at the demand of the U.S. Embassy in Tashkent and for its benefit" and that Embassy officials "were physically present and oversaw the demolition of Feruza." *Id.* ¶ 16. Moreover, Plaintiff asserts that a security checkpoint for the U.S. Embassy is now situated where Feruza was once located. *Id.* ¶ 17.

In August 1998, the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were bombed by terrorists. Beginning in 1999, limited funds were made available to U.S. State Department facilities around the world to buy or lease property adjacent to existing facilities with the purpose, at least in part, of improving security. Answer ¶ 8. On November 29,

[1] The recitations that follow do not constitute findings of fact by the Court. Rather, the recited factual elements are taken from the parties' filings and are either undisputed or alleged and assumed to be true for the purposes of the pending motion.

1999, President Clinton signed into law the Secure Embassy Construction and Counterterrorism Act of 1999, 22 U.S.C. § 4865, Pub. L. No. 106-113 (1999), which authorized the expenditure of $4.6 billion over five years for the "acquisition of United States diplomatic facilities and, if necessary, any residences or other structures located in close physical proximity to such facilities," and to provide major security enhancements to the diplomatic facilities. *Id.* at Sec. 604(b); *see also* Compl. ¶ 13. Plaintiff opines that the razing of Feruza just weeks later was not mere coincidence. *Id.* ¶ 15. Plaintiff's requests to the U.S. Embassy and local Uzbek officials for remuneration have been denied. *Id.* ¶ 23. In support of her claim, Plaintiff has presented the Court with a letter from an Uzbek official in which he asserts that the United States made an oral "demand" to local Uzbek officials to destroy Feruza for "the sake of the security of the U.S. Embassy." Letter from S.N. Akhmedov, First Deputy Administrator, Chilanzar District Administration, to Z.A. Atamirzayeva (July 15, 2005) (attached to Joint Preliminary Status Report).

DISCUSSION

Plaintiff claims she is entitled to just compensation under the Takings Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." Defendant argues that a nonresident alien plaintiff seeking compensation for the United States' involvement in the taking of foreign property lacks standing[2] to invoke the Takings Clause unless he or

[2] Defendant's motion does not raise the issue of whether the Court has personal jurisdiction over Plaintiff as required by the

she demonstrates "substantial connections" to the United States.

A. Standard of Review

On Defendant's motion for judgment on the pleadings, the Court is to assume that all well-pled allegations in the complaint are true and indulge all reasonable inferences in favor of the Plaintiff. *Owen v. United States,* 851 F.2d 1404, 1407 (Fed. Cir. 1988). "The legal standard applied to evaluate a motion for judgment on the pleadings is the same as that for a motion to dismiss." *Peterson v. United States,* 68 Fed.Cl. 773, 776 (2005). Accordingly, "[j]udgment on the pleadings ... is appropriate where there are no material facts in dispute and the [moving party] is entitled to judgment as a matter of law." *New Zealand Lamb Co., Inc. v. United States,* 40 F.3d 377, 380 (Fed.Cir.1994).

B. Analysis

1. Standing Not an Issue in *Turney v. United States*

The basis of the Defendant's motion for judgment on the pleadings is that the Plaintiff has no stand-

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Reciprocity Act. *See* 28 U.S.C. § 2502 (2000). Pursuant to the Reciprocity Act, nonresident alien plaintiffs before the Court of Federal Claims must demonstrate that their home courts would allow American citizens an "equivalent right to judicial access" if they were to bring a suit against the Plaintiff's government. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 755 (2003), *aff'd*, 378 F.3d 1346 (Fed. Cir. 2004); *see also Hue Thi Nguyen v. United States*, 56 Fed. Cl. 550, 552 (2003).

ing[3] In opposition, Plaintiff, inter alia, points to *Turney v. United States,* 126 Ct. Cl. 202, 115 F. Supp. 457 (1953), where the Court of Claims[4] held that the representative of a foreign corporation could recover for a taking by the United States of the corporation's property located abroad, based on the Fifth Amendment's requirement of just compensation. Standing, however, was not identified as an issue in that case.

The facts in *Turney* are as follows: In the latter half of 1946, the United States transferred the Leyte Air Depot to the Republic of the Philippines, which had become independent of the United States on July 4, 1946. *Id.* at 458. The Philippine government subsequently sold the supplies and buildings at the Depot to two businessmen, Paul B. Ranslow and Vernon E. Childers, who were U.S. citizens.[5] *Id.* at 459. The sale was accomplished through the inter-

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[3] On June 5, 2006, the Defendant filed a motion for judgment on the pleadings seeking to dismiss this case on two grounds: (1) Plaintiff lacked standing and (2) the United States cannot be liable for the actions of a foreign sovereign. On June 13, 2006, a status conference was held regarding whether Plaintiff should be entitled to fact discovery in order to respond to Defendant's motion. On June 15, 2006, the Defendant moved to withdraw without prejudice its motion for judgment on the pleadings and, on the following day, the instant motion was filed in its place.

[4] In 1982, the Court of Claims was abolished. In its stead, the Court of Appeals for the Federal Circuit and the Claims Court (now the Court of Federal Claims) were established. The decisions of the Court of Claims remain, however, binding precedent for both courts.

[5] Def.'s Exceptions and Br., *Turney v. United States,* at 240 (May 1, 1953).

mediary services of the Foreign Liquidation Commission (presumably a U.S. agency) which submitted bids for sale to the Philippine government. *Id.* at 458. Three months later, Ranslow and Childers formed a corporation under the law of the Philippines to manage and sell the property.[6] *Id.* at 459; Pl.'s Br., *Turney v. United States,* at 119 (Dec. 22, 1952). Ranslow and Childers transferred their interests in the property to the corporation. *Turney,* 115 F. Supp. at 459. Among the items of property purchased, employees of the corporation discovered classified military radar equipment (of which the United States was unaware). *Id.* When the United States was informed about the military radar equipment, it sought to reclaim it. *Id.* While negotiations were under way between the United States and the corporation, the Philippine government, at the suggestion of representatives of the United States, placed an embargo on exportation of any materials at the Leyte Air Depot. *Id.* at 460. Eventually, the embargo was lifted for property other than the disputed radar equipment. *Id.*

With the agreement of the Philippine government, U.S. Army Captain Royce, with a team of enlisted men, segregated the radar equipment at

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[6] The *Turney* court did not identify the corporation as Philippine. In a later case, *Seery v. United States,* 130 Ct. Cl. 481, 127 F. Supp. 601 (1955), the Court of Claims stated: "In the *Turney* case ... the plaintiff was an alien corporation...." *Id.* at 484. The *Seery* court did not explain how it arrived at this conclusion. Technically, however, the court was wrong, as the plaintiff was Edward Turney, a U.S. citizen, who was the liquidator of the corporation. Second Am. Pet., *Turney v. United States,* at 1 (Oct. 26, 1949).

Leyte. *Id.* Royce and the corporation entered into a written agreement whereby the radar equipment would be returned to the United States and a "full receipt" for the equipment would be given to the corporation. *Id.* In the agreement, the corporation stated that it intended to make a claim against the United States for losses in connection with the equipment. *Id.* Soon thereafter, the corporation was liquidated, and Edward Turney, a U.S. citizen, was designated liquidating trustee. *Id.* at 460-61.

Initially, the Philippine corporation brought suit against the United States, but later Turney was substituted as plaintiff.[7] The Court of Claims held that a Fifth Amendment taking had occurred on October 13, 1947, when U.S. Army Captain Royce and his team of enlisted men segregated the radar equipment at Leyte. *Id.* at 464.

In *Turney,* the only mention of standing as such is in plaintiff's brief, which states that "defendant conceded the right of plaintiff to maintain this action in the Court of Claims." Pl.'s Br., *Turney v. United States,* at 116 (Dec. 22, 1952). There is no discussion of standing in the court's opinion. This may have been because the plaintiff (Turney, the liquidator) was a U.S. citizen. The concession may also have been an allusion to the fact that the suit had been brought under the name of the Philippine corporation, and the plaintiff was later changed to Turney, the liquidator of the corporation.[8]

[7] The corporation's petition was amended on October 26, 1949, to substitute Turney as plaintiff. Def.'s Exceptions and Br., *Turney v. United States,* at 235 (May 1, 1953).

[8] *See* note 6, supra.

In any event, in discussing the applicability of the Fifth Amendment Takings Clause, the court did not focus on the actual plaintiff in the case; instead, it focused on the taking of property owned by the Philippine corporation. *See Turney,* 115 F. Supp. at 463-64. The court framed the issue in terms of the applicability of the Takings Clause to the "repossession" by the United States of property owned by the Philippine corporation: "[The property] was repossessed from the corporation in whose shoes the plaintiff stands. We now consider whether the repossession was a 'taking,' covered by the Fifth Amendment." *Id.* at 463. The court looked to the time of the taking that it had determined (October 13, 1947), when the property was owned by the Philippine corporation. *Id.* at 464.

Although the court focused on the taking of the property of a foreign corporation, the thrust of the court's reasoning concerned the general proposition of the applicability of the Takings Clause in foreign countries. The United States broadly argued that the Takings Clause did not apply outside the United States. *Id.* In rejecting this argument, the court merely adopted the contention of the plaintiff to the contrary, noting that there was no decision directly on point. *Id.* According to the opinion, plaintiff had argued that the Takings Clause had been applied to property belonging to a resident alien and situated in the United States, *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 51 S. Ct. 229, 75 L. Ed. 473 (1931), and to property belonging to an American citizen and situated abroad, *Wiggins v. United States,* 3 Ct. Cl. 412, 1800 WL 594 (1867). Plaintiff

had also distinguished the case of *Ross v. McIntyre,* 140 U.S. 453, 11 S. Ct. 897, 35 L. Ed. 581 (1891), in which the Supreme Court had refused to apply the right of trial by jury to an American convicted by a U.S. consular court in Japan, by noting that it denied the extraterritorial application of the constitutional right to trial by jury, not of the Takings Clause. The contention of the plaintiff was that "the right of just compensation for property taken, which can, without inconvenience or practical difficulty, be applied to a taking abroad, should ... be applied."[9] *Turney,* 115 F. Supp. at 464. Thus, although the opinion mentions the cases of (1) a resident alien plaintiff with property located in the United States, (2) a U.S. citizen with property located abroad, and (3) a U.S. citizen convicted abroad without a jury, it is difficult to conclude that the court, in laying down the general rule just quoted, had consciously opined on the issue of the standing of a foreigner to sue in a U.S. court for a taking of his or her property situated abroad. Indeed, it appears that the court was reciting these cases merely to show that there was no precedent to the contrary, rather than exploring the various permutations of U.S. citizen, resident alien, nonresident alien, property located in the United States, and property located abroad.

What seemed important to the court in *Turney* was the involvement of the United States in the taking. Just before its discussion of the extraterritorial application of the Takings Clause, the court found

[9] The contention of the plaintiff was framed in the negative. The quotation frames it in the positive, but the meaning is not changed.

that "the taking occurred on October 13, 1947, when the Army officially took possession of the property," and that the plaintiff was "entitled to recover its fair value as of that date." *Id.* at 464. Leading up to this determination, the court went into some detail regarding the relations between the United States and the Philippines. The court noted that the relations at the time between the United States and the Philippines were "close." *Id.* at 463. It also noted that the embargo imposed by the Philippine government on the radar equipment at the request of the United States "put irresistible pressure upon the corporation to come to terms with the United States Army." *Id.* Thus, in addition to the fact that the United States actually effected the taking, the discussion leads to the conclusion that the court felt that the Philippine government was acting as the virtual agent of the United States.[10]

2. What is "Standing"?

Standing can be a slippery principle. *See, e.g., Allen v. Wright,* 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (standing incorporates concepts "concededly not susceptible of precise definition"). Cases and commentators have distinguished constitutional standing requirements and prudential standing requirements. *E.g., Warth v. Seldin,* 422 U.S. 490, 498-501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). "In its constitutional dimension, standing im-

[10] In fact, the opinion states: "[Officials] of the United States Army agreed that an officer or enlisted man of the Army would be designated who should act as an *agent* of the Philippine Government in supervising the segregation and security of the radar." *Turney,* 115 F. Supp. at 460 (emphasis added).

ports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III."*Id.* at 498, 95 S. Ct. 2197. Clearly, this is not the issue here. The prudential standing inquiry is essentially "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500, 95 S. Ct. 2197. Note that the focus of the prudential standing inquiry is on the plaintiff's position—as it is in the instant case. Defendant's standing argument is whether the Plaintiff has substantial connections to the United States in order to bring suit in the first place. This is not the focus of the opinion in *Turney.* As this Court has pointed out above, the focus in *Turney* is on the involvement of the United States in the taking; it is not on the status of the owner as a nonresident alien. In other words, the question in a standing inquiry is, "May this person argue in court that the United States is responsible for a taking?"—not, "Does the Takings Clause apply in these circumstances?"

Another case that focuses on the involvement of the United States in the taking and not on the plaintiff's position is *Langenegger v. United States,* 756 F.2d 1565 (Fed. Cir. 1985). Judging the level of involvement of the United States in the taking of property located abroad eventually evolved into the "direct and substantial" participation rule of *Langenegger. Id.* at 1571. Standing, however, was not an issue in *Langenegger.* As the owners of the property (and the plaintiffs) in *Langenegger* were U.S. citizens, the issue was not their standing to sue but whether they were entitled to relief for foreign

property expropriated by a foreign government because of pressure brought to bear on that government. *Id.* at 1567, 1572. Having no threshold question concerning whether this kind of plaintiff may sue, the court could proceed immediately to examine the extent of the United States' involvement in the alleged taking.

3. The Substantial Connections Test

The substantial connections test for standing that the Defendant urges on the Court in this action is found in *United States v. Verdugo-Urquidez, ,* 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).[11] In *Verdugo-Urquidez,* Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, was arrested by Mexican authorities on drug-related offenses and later by U.S. Marshals after having been transported to a border patrol station. *Id.* at 262, 110 S. Ct. 1056. The U.S. Drug Enforcement Agency (DEA), working with Mexican officials, then searched Verdugo-Urquidez's Mexican residences. *Id.* At trial, Verdugo-Urquidez moved to suppress evidence

[11] In *Verdugo-Urquidez,* the Court uses variously: "sufficient connection," "substantial connections," "significant voluntary connection," "substantial connection," "voluntary connection," "attachment," and "voluntary attachment." *Verdugo-Urquidez,* 494 U.S. at 265, 271, 274, 110 S .Ct. 1056. "Voluntary" seems necessary only in the context of *Verdugo-Urquidez,* where the plaintiff was in the custody of the United States. "Significant" does not seem different from "substantial" in the Court's usage in *Verdugo-Urquidez.* Therefore, this Court adopts the Defendant's phrase, "substantial connections," as adequately capturing the concept as described in *Verdugo-Urquidez* for purposes of this case.

that was seized during the searches as violating the Fourth Amendment. *Id.* at 263, 110 S. Ct. 1056. The trial court agreed with the defendant, and its decision was affirmed on appeal. *Id.* Ultimately, however, the Supreme Court held that Verdugo-Urquidez could not invoke the protections of the Fourth Amendment: "At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application." *Id.* at 274-75, 110 S. Ct. 1056. Earlier in the opinion the Court noted that "Respondent is an alien who has had no previous significant voluntary connection with the United States." *Id.* at 271, 110 S. Ct. 1056. Although the issue of standing is technically irrelevant in *Verdugo-Urquidez* as Verdugo-Urquidez was a defendant in a criminal action, the issue was analogous to standing; that is, the issue was "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth,* 422 U.S. at 500, 95 S. Ct. 2197. In this sense, plaintiff Verdugo-Urquidez did not have "standing" to make an argument based on the Fourth Amendment.

4. No Clear Precedent On Standing Issue

Research conducted by this Court reveals that there are only three precedential takings cases that cite *Turney* and that involve a foreign plaintiff *and* property located abroad: *Camacho v. United States,* 204 Ct. Cl. 248, 494 F.2d 1363 (1974), *Porter v. United States,* 204 Ct. Cl. 355, 496 F.2d 583 (1974),

and *El-Shifa Pharm. Indus. Co. v. United States,* 55 Fed. Cl. 751 (2003), *aff'd,* 378 F.3d 1346 (Fed. Cir. 2004) ("*El-Shifa*"). Only one of these, *El-Shifa,* dealt with standing.

Camacho involved an alleged taking of land in Saipan during World War II. *Camacho,* 494 F.2d at 1364. Between the two World Wars, Saipan was governed by Japan under a mandate from the League of Nations. *Id.* After World War II, Saipan became part of the United States Trust Territory of the Pacific Islands under a delegation of the United Nations. *Id.* at 1364-65. The Court of Claims dismissed plaintiffs' claims based on the statute of limitations, but noted in dictum that "Defendant does not challenge the plaintiffs' position that the United States Constitution guarantees just compensation to an alien for the taking of property in a foreign country. This was decided as a matter of first impression in *Turney* ...." *Id.* at 1368. Standing was not mentioned, due in part, one suspects, to the fact that the claim was dismissed on the basis of the statute of limitations. The statute of limitations issue would also likely have been a factor in the defendant's decision to concede the applicability of the Constitution abroad. In any event, the *Camacho* court did not discuss whether persons in the position of plaintiffs had standing to sue the United States.

Porter involved an alleged taking by the U.S. government of property located in the Pacific Islands Trust Territory. *Porter,* 496 F.2d at 585. The Court of Claims rejected the government's argument that the Takings Clause did not have application outside the United States, citing *Turney,* but concluded that,

under the facts of the case, plaintiffs had failed to demonstrate that it was the United States that had taken their property. *Id.* at 591. Thus, in effect, the court was not faced with the precise issue of whether the Takings Clause applies to a taking by the United States of property located abroad belonging to a foreign owner. (Recall that in *Turney* the court had found that the United States had effected the taking.) Again, the *Porter* court did not discuss whether a person in the position of plaintiff had standing to sue the United States.

Only in *El-Shifa* does one find a foreign plaintiff, an alleged taking abroad, and the issue of standing. *El-Shifa* involved a Sudanese corporation suing the United States for a taking as a result of the destruction of its plant in Sudan by U.S. military operations. *El-Shifa,* 55 Fed. Cl. at 754. In the Court of Federal Claims, the government asserted that the plaintiff, a nonresident alien, had no standing because "the Fifth Amendment does not extend to 'takings' of property located outside the United States and owned by non-citizens." *Id.* at 760. Judge Baskir, although opining that the "Government is probably correct," *id.,* rejected the government's argument because of *Turney,* which he felt bound to follow despite misgivings based on subsequent cases. *Id.* at 762.

The Federal Circuit affirmed Judge Baskir, but on the grounds of nonjusticiable political question. *El-Shifa,* 378 F.3d at 1352. Where the Federal Circuit discussed *Turney,* it largely reported the position of the parties and of the court below on the meaning of *Turney. See id.* at 1352. In only two sen-

tences did the Federal Circuit seem to express its own views of *Turney*. It averred that the *Turney* court held that "the seizure by the United States of radar equipment located in the Philippines, owned at the time by a Philippine corporation, constituted a taking," and that, "[a]lthough the *Turney* court did not specifically inquire into the substantial connections of the corporation or its property to the United States, it did reject the government's argument that the Takings Clause lacked extraterritorial application." *Id.*

Thus, no case has been brought to the attention of this Court nor has this Court found through independent research a decision of the Court of Claims or of the Federal Circuit that is binding precedent on the relevant issue: whether a foreign plaintiff or owner has *standing* to assert a claim for just compensation based on the Takings Clause of the Fifth Amendment for an alleged taking by the United States of property located abroad. Indeed, the Federal Circuit in *El-Shifa* seems to adumbrate the distinction between the standing test of *Verdugo-Urquidez* and the issue of the applicability of the Constitution abroad in the statement quoted above, where it juxtaposes: "[T]he *Turney* court did not specifically inquire into the substantial connections of the corporation or its property to the United States," on the one hand, and "it did reject the government's argument that the Takings Clause lacked extraterritorial application," on the other. *Id.* Of course, *Verdugo-Urquidez* was decided many years after *Turney*. In sum, as *Turney* was not concerned with standing, it does not preclude this Court from applying the substantial connections test of *Verdugo-*

Urquidez to the case at bar.

5. The Substantial Connections Test and the Takings Clause

Verdugo-Urquidez, however, involved the Fourth Amendment. In the context of the Fifth Amendment (although not the Takings Clause), the Supreme Court in *Johnson v. Eisentrager,* 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), held that the writ of habeas corpus was not available to German nationals held in the custody of the U.S. Army in Germany after World War II, having been convicted of engaging in military activity against the United States in China after the surrender of Germany. For the *Eisentrager* Court the ultimate question in the case was "one of jurisdiction of civil courts in the United States vis-a-vis military authorities in dealing with enemy aliens overseas."[12] *Id.* at 765, 70 S. Ct. 936. The *Verdugo-Urquidez* Court discussed *Eisentrager,* characterizing it as "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez,* 494 U.S. at 269, 110 S. Ct. 1056.[13]

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[12] A petitioner for a writ of habeas corpus is even more analogous to a plaintiff in a civil action. Thus, the issue in *Eisentrager* is even more analogous to standing than the search and seizure issue in *Verdugo-Urquidez.*

[13] It is curious that, although *Eisentrager* had been decided before *Turney* and was cited in the *Turney* briefs, the court did not mention it in the *Turney* opinion. *See* Pl.'s Reply Br., *Turney v. United States,* at 310 (May 27, 1953). One surmises that it was because *Eisentrager* involved habeas corpus rather than a takings claim. Recall that the court had distinguished *Ross v. McIntyre* on the basis that it involved the right of trial by jury.

Regarding the Takings Clause of the Fifth Amendment, nonresident aliens may invoke the Takings Clause to seek remuneration for the expropriation of their property located within the United States. *See Russian Volunteer Fleet,* 282 U.S. at 491-92, 51 S. Ct. 229 (alien corporation may assert a taking with respect to property within the United States). In addition, the Takings Clause is available to a U.S. citizen for property located extraterritorially. *E.g., Seery v. United States,* 130 Ct. Cl. 481, 127 F. Supp. 601, 603 (1955). However, the precise issue regarding whether a nonresident alien must demonstrate a substantial connection with the United States to have standing to invoke the Takings Clause regarding property outside the United States remains unsettled—at least to the extent that neither the Supreme Court nor the Federal Circuit has squarely addressed the issue.

a. *Ashkir v. United States*

Lacking authoritative direction from the Supreme Court and the Federal Circuit, this Court is persuaded by the reasoning of the Court of Federal Claims in *Ashkir v. United States,* 46 Fed. Cl. 438 (2000), that the substantial connections test of *Verdugo-Urquidez* should be applied to determine whether a nonresident alien plaintiff has standing to bring a suit against the United States for a taking of property located abroad. *Id. Ashkir* involved a Somali citizen who claimed that the destruction of his property in Mogadishu by a U.S. military operation constituted a taking without just compensation. This Court adopts the reasoning of Judge Allegra in that

case.[14] In sum, Judge Allegra based his conclusion on three points: (1) "the 'substantial connections' rationale employed in *Verdugo-Urquidez, Johnson [i.e., Eisentrager]* and other cases does not hinge on the specific language of any amendment, but rather on an overarching construct of the limited extraterritoriality of the Constitution and, in particular, the Bill of Rights"; (2) "some courts and commentators have surmised that since the 'substantial connections' requirement bars the defensive assertion of constitutional rights, as a shield, by aliens haled into U.S. courts and subjected to criminal prosecution, it certainly must bar offensive assertions of constitutional rights, as a sword, by nonresident aliens voluntarily seeking redress in civil proceedings"; and (3) "although not always identified as such, the 'substantial connections' requirement is well-evidenced in numerous cases involving takings claims." *Id.* at 443-444.

In adopting Judge Allegra's rationale, this Court wants to make clear that the result is not a repudia-

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[14] Curiously, Judge Allegra did not feel the need to discuss *Turney,* probably because he saw *Turney* as a case involving a U.S. citizen as plaintiff (i.e., the liquidator of the Philippine corporation). *Ashkir,* 46 Fed. Cl. 438 at 440. This Court, however, as discussed earlier, agrees with Judge Baskir, who felt that the significant party for the *Turney* court was the Philippine corporation. Judge Baskir, in discussing *Ashkir* in *El-Shifa,* concluded: "The *Ashkir* decision, for instance, appears to have simply avoided the impact of *Turney* by classifying it as a case involving a United States plaintiff; of course, this does not alter the fact that the owner of the taken property, as acknowledged in *Seery,* was, prior to liquidation, a foreign corporation." *El-Shifa,* 55 Fed. Cl. at 763-64.

tion of the general principle that the Takings Clause of the Fifth Amendment has extraterritorial application. This is what *Turney* and many other cases hold. Instead, the result is that the threshold question of standing is to be resolved by the application of the substantial connections test of *Verdugo-Urquidez.* Once a nonresident alien owner has established substantial connections with the United States, he or she may proceed to argue that he or she is entitled to compensation under the Fifth Amendment for the taking of his or her property located abroad. *Turney,* then, would require a look at the involvement of the United States in the taking and a determination whether the Takings Clause could be applied "without inconvenience or practical difficulty."[15] *See*

[15] The "inconvenience and practical difficulty" in applying the Takings Clause to property located abroad has not been a factor in the relevant cases. It may very well be in this case, where the relations between the United States and Uzbekistan are strained, and it does not appear that Uzbekistan is a democracy in any real sense of the word. For example, the on-line version of *The World Factbook* of the Central Intelligence Agency as of this writing describes the government of Uzbekistan as "authoritarian rule, with little power outside the executive branch." https://www.cia.gov/library/publications/the-world-factbook/geos/uz.html. Furthermore, this source notes that Uzbekistan "still lacks [an] independent judicial system." *Id.* The website for the U.S. Department of State simply states that "Uzbekistan is not a democracy and does not have a free press." http://www.state.gov/r/pa/ei/bgn/2924.htm. In May 2005, "troops opened fire on protestors," and the European Union "imposed sanctions when [Uzbek] authorities rejected calls for an international inquiry." *Id.* The United States threatened to withhold aid, and the Uzbek Parliament has demanded that U.S. forces leave their base in the southern part of the country. *Id.* The website for the U.S. Department of State simply states that "Uzbekistan is not a democracy and does not have a free press." *Id.*

Turney, 115 F. Supp. at 464.

> Under these circumstances, there may be little hope for successful discovery of the alleged involvement of the United States in the removal of the plaintiff's cafeteria by the Uzbek authorities. For example, one wonders about Ms. Atamirzayeva's freedom to speak the truth, as it was the Uzbek government that demanded that the local authorities seize her property. Pl.'s Opp'n at 3. Furthermore, in the context of touchy relations with Uzbekistan, the United States might very well—and perhaps justifiably—refuse to divulge the details of its relationship with Uzbekistan in 1999. For example, how will Plaintiff prove the allegation in her complaint that there is evidence of a "secret alliance" between the United States and Uzbekistan? *See* Compl. ¶ 9.

b. *Hoffman v. United States*

In addition to the Court of Federal Claims, the U.S. District Court for the District of Columbia has also applied the substantial connections test to bar nonresident aliens from asserting Fifth Amendment takings claims, based largely on *Verdugo-Urquidez, Eisentrager,* and *Russian Volunteer Fleet.* In *Hoffmann v. United States,* 53 F. Supp. 2d 483 (D.D.C. 1999) *aff'd in part, vacated in part,* 17 Fed. Appx. 980 (Fed. Cir. 2001) (unpublished), German citizens, who were successors-in-interest, brought ac-

tions against the United States to recover the photographic archives of a German photographer and watercolor paintings by Adolf Hitler, both of which were seized in Germany by the U.S. Army during World War II. *Hoffmann,* 53 F. Supp. 2d at 484-85. The case has a complicated history. At one point, however, it was appealed to the Federal Circuit, where the plaintiffs challenged the district court's ruling regarding nonresident aliens and the Takings Clause. *Hoffmann,* 17 Fed. Appx. at 980. In an unpublished (and therefore non-precedential) decision, the court affirmed the district court's holding on the Fifth Amendment takings claims because plaintiffs failed "to establish 'substantial connections' to the United States." *Id.* at 986. The Federal Circuit's opinion did not mention *Turney.*

c. *Rosner v. United States*

Similarly, the U.S. District Court for the Southern District of Florida has held in *Rosner v. United States,* 231 F. Supp. 2d 1202 (S.D. Fla. 2002), that a foreign plaintiff must have substantial connections with the United States in order to overcome a motion to dismiss for failure to state a claim in a takings case where the property allegedly taken is located abroad. *Rosner* involved the "Nazi Gold Train." *Id.* at 1204. In the waning months of World War II, the Hungarian government, which was an ally of Nazi Germany, loaded a train with valuables looted from Hungarian Jews and sent the train on its way to Germany. *Id.* The U.S. military seized the train in Salzburg, Austria. *Id.* The valuables were dissipated over the ensuing years. *Id.* at 1205. The plaintiffs were Hungarian Jews, or their descen-

dants, whose valuables were on the train. *Id.* at 1203-04. The court found the relevant time to be the time of the alleged taking, when the plaintiffs were not U.S. citizens and the property was in Austria. *Id.* at 1213. The court based it[s] reasoning on *Verdugo-Urquidez* and was persuaded by Judge Allegra's analysis in *Ashkir*. *Id.* at 1213-14.

In the instant case, the Plaintiff and owner of the property is a nonresident alien. The property is located outside the United States—specifically, in Uzbekistan. The Uzbek authorities forcibly expelled Plaintiff from her property. Compl. ¶ 1. The Plaintiff has not alleged substantial connections with the United States; therefore, the Plaintiff does not have standing to invoke the protection of the just compensation clause of the Fifth Amendment for an alleged taking by the United States.

6. Substantial Connections in *Turney*

Finally, it is noteworthy that had the substantial connections test been applied to *Turney,* the Philippine corporation would have had standing. This Court, thus, agrees with Defendant's conclusion in this regard. *See* Def.'s Mot. at 6-7. First, Ranslow and Childers, U.S. citizens, bought the Leyte Air Depot property (which had lately been the property of the U.S. government). *Turney,* 115 F. Supp. at 459, 463. Second, Ranslow and Childers assigned their interests in the property to the Philippine corporation, which they were in the process of forming. *Id.* at 459, 463; Pl.'s Br., *Turney v. United States,* at 119 (Dec. 22, 1952). Third, Ranslow and Childers were the active owners of the corporation: Childers was

notified about the radar; Ranslow held a conference with the U.S. military authorities, and he refused to allow U.S. agents to enter the depot; and Childers and Ranslow engaged in negotiations with the U.S. government and with the Philippine government over the property. *Turney,* 115 F. Supp. at 459-60. Fourth, the U.S. Army made a written agreement with the Philippine corporation on November 11, 1947, concerning the property. *Id.* at 460, 462; *see Hoffmann,* 53 F. Supp. 2d at 491 (finding that a contractual relationship with the United States could be a substantial connection). Thus, even though the *Turney* court did not identify the need for substantial connections between the owners and the United States, the corporation in *Turney* would have satisfied this test, whereas Ms. Atamirzayeva decidedly would not.

7. The Substantial Connections Test is Preferable

As the Defendant's motion is based on standing, the Court confines itself to this issue, holding that Plaintiff does not have standing to bring this action because she lacks substantial connections with the United States. However, the Court has alluded, in footnote 15, to the possibility that, even if substantial connections with the United States are not required, Plaintiff may have a hard time passing the "without inconvenience and practical difficulty" test of *Turney.* There is also the inquiry into the level of involvement of the United States in the taking, which is required by *Langenegger.* Because both of these issues would seem to entail factual findings, the threshold determination of standing based on the

application of the substantial connections test has the additional practical effect of promoting the efficient disposition of this case.

CONCLUSION

In the instant case, Plaintiff, an Uzbek citizen, lacks standing to invoke the Takings Clause of the Fifth Amendment for the alleged taking of her cafeteria in Uzbekistan because she has failed to demonstrate any substantial connections to the United States. Accordingly, the Defendant's motion for judgment on the pleadings is hereby GRANTED. The Clerk of the Court is directed to dismiss this case with prejudice.

APPENDIX C

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007—5159

ZOYA ATAMIRZAYEVA,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 05-CV-1245, Chief Judge Edward J. Damich.

ORDER

A petition for rehearing en banc having been filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 12, 2008.

FOR THE COURT,

/s/

Jan Horbaly
Clerk

Dated: 08/05/2008

cc: Christopher M. Ryan
John T. Stahr

ATAMIRZAYEVA V US, 2007-5159
(CFC – 05-CV-1245)

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 05-1245L

ZOYA ATAMIRZAYEVA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

1. This is a civil action brought by Mrs. Zoya Atamirzayeva, a citizen of the Republic of Uzbekistan and resident of the city of Tashkent, Uzbekistan. Mrs. Atamirzayeva owned a cafeteria adjacent to the United States Embassy in Tashkent. In December 1999, local authorities in Tashkent forcibly took and destroyed her cafeteria because of "its closeness to the Embassy of the United States of America and for the security improvements of the Embassy." The local authorities in Tashkent subsequently confirmed that they had destroyed the cafeteria at the express direction of, and for the benefit of, the United States Government. Mrs. Atamir-

zayeva has never been compensated for the taking of her property, in direct violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

I.
JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction of this civil action and is authorized to grant the requested relief pursuant to 28 U.S.C. § 1491. A cause of action exists under the Fifth Amendment to the Constitution of the United States. Because Uzbek law accords to citizens of the United States the right to prosecute claims against the Government of Uzbekistan in Uzbek courts, this Court is not deprived of jurisdiction by 28 U.S.C. § 2502(a). *See* CONST. OF UZB. art. 23, 35, 44.

II.
PARTIES

3. Plaintiff, Mrs. Zoya Atamirzayeva, is a citizen of the Republic of Uzbekistan. She resides in the city of Tashkent, which is the capital of the Republic of Uzbekistan.

4. Defendant United States of America is the Executive Branch of the Government.

III.
FACTS

A. Background regarding Plaintiff's Cafeteria

5. In 1994, Mrs. Atamirzayeva became the sole owner of a cafeteria called Feruza. The Feruza

complex consisted of a main building about 2000 square feet large, an outdoor drink stand, a detached storage facility, a guard post, and a parking lot.

6. Feruza was located on property adjacent to the U.S. Embassy in Tashkent, Uzbekistan. The Republic of Uzbekistan owned the real property upon which Feruza was located; however, Mrs. Atamirzayeva was the sole owner of the buildings located on that real property and the business of Feruza.

7. Mrs. Atamirzayeva employed about twenty people at Feruza, six of whom were members of her immediate family. Feruza was a profitable restaurant, and was the primary source of income for Mrs. Atamirzayeva and nine members of her immediate family.

B. State Department Concerns about the Security of the U.S. Embassy in Tashkent

8. In August 1998, terrorists bombed the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Thereafter, the U.S. Department of State (the "State Department") announced a major new initiative to improve security at U.S. embassies around the world – particularly in those countries where U.S. interests were facing "medium" or "high" security risks and, therefore, were regarded as "most vulnerable."

9. Uzbekistan presents severe terrorist risks to U.S. interests. As described by the State Department:

> [T]he United States Government continues to receive information that indicates that terrorist groups may be planning future attacks, possibly against U.S. interests, in Uzbekistan. [¶] Supporters of terrorist groups such as the Islamic Movement of Uzbekistan, Al-Qaida, the Islamic Jihad Union, and the Eastern Turkistan Islamic Movement are active in the region. Members of these groups . . . have attacked U.S. Government interests in the past, including the U.S. Embassy in Tashkent. . . . [¶] Uzbekistan experienced a wave of terrorist violence in 2004. Three suicide bombings occurred in July 2004 in Tashkent, including one outside the U.S. Embassy. . . .
>
> . . . .
>
> The U.S. Embassy in Tashkent continues to employ heightened security precautions.

10. Upon information and belief, the State Department first added a terrorism warning to its "consular information sheet" for Americans traveling to Uzbekistan in September 1999, just three months before the destruction of Feruza. Although not yet as explicit as the warning quoted above, the language published in September 1999 expressed official State Department concern about the prospect of "terrorist attacks" in Uzbekistan.

11. The State Department's embassy security initiative continued through all times relevant to this Complaint. The State Department recognized in 1999 that the U.S. Embassy in Tashkent was at risk of terrorist attack and implemented numerous measures to increase the security of the Embassy's physical plant and its personnel.

12. Also in 1999, pursuant to its embassy security initiative, the State Department began acquiring properties adjacent to U.S. embassies worldwide. The State Department in fiscal year 1999 "obligated approximately $15.3 million to acquire real property" in Tashkent, Uzbekistan and at eleven other posts. By September 30, 1999, in response to requests from thirty U.S. overseas posts, the State Department acquired properties to increase the security perimeters (or "setbacks") at five U.S. embassies and was negotiating for properties at 25 additional posts. By 2003 the State Department had "acquired adjacent land at 34 posts to increase setback since the 1998 embassy bombings."

13. In November 1999, the U.S. Congress passed the Secure Embassy Construction and Counterterrorism Act of 1999, 22 U.S.C. § 4865 nt., Pub. L. No. 106-113 (1999) (the "Secure Embassy Act"). President Clinton signed the Secure Embassy Act into law on November 29, 1999. It authorized $4.6 billion to be spent over five years by the State Department to bring diplomatic facilities into compliance with security requirements by (i) acquiring diplomatic facilities and "if necessary, any residences or other structures located in close physical proximity

to such facilities;" and (ii) providing "major security enhancement" to such facilities.

14. Several months later, in April 2000, then Secretary of State Madeleine Albright highlighted ongoing concern for the security of the U.S. Embassy in Tashkent. On a visit to the Embassy, she stated:

> I have to tell you, this is a facility we use, you might be surprised, basically as the poster child of why we need money. . . . [¶] President Clinton and I have been consistently pushing for larger budgets in order to be able to get you the resources that are necessary. [¶] The weird part is trying to persuade Congress that you need both safe buildings and something to do in them. You have your choice: you can either have safe buildings with no people, or people in unsafe buildings. That seems to be the choices that are starkly placed. But we are trying to get both, because we so respect the work that you do.

Secretary Albright also flagged terrorism in Uzbekistan as a priority, stating:

> This is an area of the world that is tremendously important in terms of what it produces and what it doesn't produce. I think that the production of some narco-trafficking and terrorist and extremist activity is obviously something that is very important to us and we're spending a lot of time on trying to deal with that.

C. The Destruction of Feruza at the Direction of the U.S. Embassy in Tashkent

15. On or about December 20, 1999, just weeks after enactment of the Secure Embassy Act and in the midst of the State Department's global efforts to improve security for U.S. embassies, the United States through the U.S. Embassy in Tashkent made an express verbal "demand" that the local authorities in Tashkent destroy Feruza within three days "for the sake of the security of the US Embassy."

16. On or about December 23, 1999, the local authorities in Tashkent forcibly expelled Mrs. Atamirzayeva from Feruza. They seized the property, and destroyed the cafeteria. They acted at the demand of the U.S. Embassy in Tashkent and for its benefit. Officials from the U.S. Embassy were physically present at and oversaw the demolition of Feruza.

17. The property where Feruza had been located now contains a security checkpoint for the U.S. Embassy in Tashkent, constructed in part from the remains of Feruza, which is manned by armed Uzbek soldiers.

D. Uzbekistan's Dependence on the United States

18. At the time the Uzbek Government executed the United States' demand to destroy Feruza, Uzbekistan was a fledging state confronted by severe threats to its national security. Uzbekistan received

crucial aid from the United States, which gave the United States pervasive influence over Uzbekistan in and around 1999 and made irresistible its demand for the destruction of Feruza.

19. The United States and Uzbekistan were engaged in a "secret alliance" at all times relevant to this Complaint. Indeed, that alliance had "intensified" in and around 1999, after the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Thomas E. Ricks & Susan B. Glasser, *U.S. Operated Secret Alliance with Uzbekistan*, Wash. Post, Oct. 14, 2001, at A1 (quoting an interview with Rustam Jumaev, the chief spokesman for Uzbek President Islam Karimov).

20. According to the *New York Times*, the United States provided considerable military aid to Uzbekistan in and around 1999, including: (i) Green Berets from the U.S. Army instructed Uzbek troops in "marksmanship, infantry patrolling, map reading and the like"; (ii) the United States "helped the Uzbek military and border guards acquire nonlethal equipment, including helmets, flak jackets, Humvee transport vehicles, night-vision goggles and radiation detectors"; and (iii) the United States "enroll[ed] Uzbek officers in American military schools." C. J. Chivers, *Long Before War, Green Berets Built Military Ties to Uzbekistan*, N.Y. Times, Oct. 25, 2001, at A1. In sum, the United States helped Uzbekistan to create a modern national military.

21. In 1999, at the time Uzbekistan received this U.S. military assistance, Uzbekistan faced key threats to its national security. First, Uzbek troops

were fighting the Islamic Movement of Uzbekistan ("IMU"), "a home-grown terrorist group linked to [Osama] bin Laden. The group launched armed incursions into Uzbekistan in 1999 and 2000 and is blamed by [Uzbek President] Karimov for setting off explosions in the capital [Tashkent] that killed 18 people." Thomas E. Ricks & Susan B. Glasser, *U.S. Operated Secret Alliance with Uzbekistan*, Wash. Post, Oct. 14, 2001, at A1. Second, Uzbekistan was "alarm[ed]" by developments in neighboring Afghanistan, where the bid Laden-affiliated regime "captured the territory adjoining Uzbekistan in 1998" and "harbored" IMU fighters. *Id.* Finally, Uzbekistan – which had been part of the Soviet Union until 1991 – was striving to maintain and build its independence in the face of renewed Russian interest in the Newly Independent States of Central Asia by reducing its military dependence on Russia, which had previously been the only country to provide military training for the Uzbek army.

22. Beyond military assistance, the United States also provided significant economic assistance to Uzbekistan. In 1999, the Uzbek economy effectively collapsed, rendering the country increasingly dependent on foreign aid. The United States responded by allotting an estimated $30 million in assistance to Uzbekistan in 1999, an increase of almost 40 percent over 1998 levels. In 2000, U.S. aid increased another 33 percent, to $40 million.

E. Mrs. Atamirzayeva's Unsuccessful Efforts to Obtain Compensation

23. Mrs. Atamirzayeva has received no compensation from any source for the destruction of Feruza. She and her family have demanded compensation from both the U.S. Embassy in Tashkent and the local authorities in Tashkent. Although the U.S. Embassy in Tashkent met with Mrs. Atamirzayeva and her family over the course of several months regarding her request for compensation, the United States through the Embassy ultimately refused her request. The local authorities in Tashkent also denied Mrs. Atamirzayeva's request for compensation, implying that responsibility for compensation lay with the United States because their actions were done "for the security improvements of the Embassy."

24. All real property in Uzbekistan is owned by the state. All construction requires the permission of the state. The local authorities in Tashkent have authorized Mrs. Atamirzayeva to construct a new cafeteria on another plot of land. This authorization is set to expire in July 2006, unless a new cafeteria has been constructed by that time. Mrs. Atamirzayeva lacks the resources needed to build a new cafeteria.

25. Mrs. Atamirzayeva has never objected to the fact that the U.S. Embassy in Tashkent caused the destruction of her property, and does not so object now. To the contrary, Mrs. Atamirzayeva understands and sympathizes with the need to protect the U.S. Embassy in Tashkent from terrorist attack.

She demands only that she receive just compensation for the property taken from her.

IV.
CLAIM
The United States Violated the Fifth Amendment to the Constitution When It Ordered Feruza to be Destroyed Without Compensation

26. Plaintiff realleges and incorporates herein by reference each and every allegation set forth above, as if fully repeated herein.

27. The Takings Clause of the Fifth Amendment to the United States Constitution states that "nor shall private property be taken for public use, without just compensation."

28. The destruction of Feruza is a taking of property.

29. The destruction of Feruza was done at the express direction of the U.S. Government, and conferred a substantial benefit on the U.S. Government.

30. The United States is liable for the destruction of Feruza under the Takings Clause of the Fifth Amendment to the United States Constitution, and is obliged to pay just compensation.

V.
PRAYER FOR RELIEF

31. Wherefore, based on the allegations set forth above, Plaintiff hereby seeks:

1. Compensation in an amount to be determined at trial, payable in U.S. dollars, for the destruction of Feruza;

2. Interest from the date of the destruction of Feruza;

3. Reasonable attorneys' fees and the costs of this action; and

4. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/

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No. 08-600

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In the Supreme Court of the United States

ZOYA ATAMIRZAYEVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a foreign national with no connection to the United States may assert a claim under the Just Compensation Clause of the Fifth Amendment for the taking of property in a foreign country.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 524 F.3d 1320. The opinion of the Court of Federal Claims (Pet. App. 21-46) is reported at 77 Fed. Cl. 378.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2008. A petition for rehearing was denied on August 5, 2008 (Pet. App. 48-49). The petition for a writ of certiorari was filed on November 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a citizen and resident of Uzbekistan, owned a cafeteria near the United States Embassy in Tashkent, Uzbekistan. Pet. App. 51-52. Petitioner al-

leges that the United States demanded that local authorities destroy her cafeteria "for the sake of the security of the [United States] Embassy." *Id.* at 56. She further alleges that, on or about December 23, 1999, local authorities, "act[ing] at the demand of the U.S. Embassy in Tashkent and for its benefit," destroyed the cafeteria. *Ibid.*

2. Petitioner brought this action against the United States in the Court of Federal Claims, seeking compensation for the taking of her property. Pet. App. 50-61. The court dismissed the complaint. *Id.* at 21-46. The court acknowledged "the general principle that the Takings Clause of the Fifth Amendment has extraterritorial application," *id.* at 41, in the sense that nonresident aliens may seek just compensation for the taking of property located within the United States, and United States citizens may seek just compensation for the taking of property located outside the United States, *id.* at 39. But the court held that, to pursue a claim for just compensation for a taking of foreign property, a nonresident alien must, as a threshold matter, demonstrate "substantial connections" to the United States. *Id.* at 41. Since petitioner "failed to demonstrate any substantial connections to the United States," the court concluded that petitioner could not assert a claim under the Just Compensation Clause for the taking of property in a foreign country. *Id.* at 46.

The Court of Federal Claims went on to explain that, even when a plaintiff does have substantial connections to the United States, a court must "look at the involvement of the United States in the taking" and must determine "whether the Takings Clause could be applied 'without inconvenience or practical difficulty.'" Pet. App. 41 (quoting *Turney* v. *United States*, 126 Ct. Cl. 202, 215

(1953)). The court observed that adjudicating the claim in this case might "very well" present "practical difficulty" because "relations between the United States and Uzbekistan are strained," and Uzbekistan has an authoritarian government with no independent judicial system. *Id.* at 41 n.15; see *id.* at 45 ("[E]ven if substantial connections with the United States are not required, Plaintiff may have a hard time passing the 'without inconvenience and practical difficulty' test of *Turney*.").

3. The court of appeals affirmed. Pet. App. 1-20. The court began by surveying this Court's "cases involving the extraterritorial application of constitutional provisions." *Id.* at 3; see *id.* at 4-12 (citing *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990); *Reid* v. *Covert*, 354 U.S. 1 (1957); *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); several of the *Insular Cases*[*]; and *In re Ross*, 140 U.S. 453 (1891)). Based on its analysis of those cases, the court rejected petitioner's contention "that the Fifth Amendment protects the foreign property of citizens of every foreign country without regard to their connections with the United States." *Id.* at 17. In particular, the court emphasized that *Verdugo-Urquidez* reaffirmed *Eisentrager*'s rejection of "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 10 (quoting *Verdugo-Urquidez*, 494 U.S. at 269).

Petitioner relied on the Court of Claims' decision in *Turney*, *supra*, which allowed a Philippine corporation to bring a claim against the United States for just compensation for the taking of property located in the Phil-

[*] *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922); *Dorr* v. *United States*, 195 U.S. 138 (1904); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); and *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

ippines. In petitioner's view, *Turney* established that "a non-resident alien [need not] show any connection to the United States in order to assert a takings claim for overseas property." Pet. App. 13. The court of appeals explained, however, that "the claimant in *Turney*," unlike petitioner, had "significant connections to the United States." *Id.* at 17. And the court also noted that interpreting *Turney* as petitioner urged "would be in tension with the Supreme Court's subsequent decision in *Verdugo-Urquidez*." *Id.* at 18.

4. Petitioner filed a petition for rehearing en banc, arguing that the decision of the court of appeals conflicted with this Court's decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), which was issued shortly after the panel's decision. The court of appeals denied the petition for rehearing. Pet. App. 48-49.

ARGUMENT

The court of appeals correctly held that aliens who lack any connection to the United States may not assert claims under the Just Compensation Clause for the taking of property in foreign countries. That holding is consistent with this Court's decisions in *Johnson* v. *Eisentrager*, 339 U.S. 763, 781-785 (1950), and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), and it does not conflict with any decision of any other court of appeals. Further review is not warranted.

1. This Court has repeatedly reaffirmed "that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). In particular, the Fifth Amendment does not apply to aliens who have no presence in any territory over which the United States is sovereign.

Verdugo-Urquidez, 494 U.S. at 269 ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); *Zadvydas*, 533 U.S. at 693 (citing *Verdugo-Urquidez* for the proposition that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States); *Eisentrager*, 339 U.S. at 783 (finding "no authority whatever" supporting the contention "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located"). The court of appeals correctly applied those precedents when it determined that petitioner—an alien who does not allege that she has any connection to the United States—could not assert a claim under the Fifth Amendment for the taking of property located in Uzbekistan.

2. Petitioner asserts (Pet. 10-11) that the decision below conflicts with *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), which held that aliens detained as enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba, enjoy rights under the Suspension Clause of the Constitution, Art. I, § 9, cl. 2. Petitioner is incorrect for two reasons.

First, the Court's decision in *Boumediene* was grounded on the unique status of Guantanamo Bay, and specifically what the Court described as "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory." 128 S. Ct. at 2253. The opinion repeatedly emphasized the unusual status of Guantanamo Bay. See, *e.g.*, *id.* at 2252 ("Cuba effectively has no rights as a sovereign."); *id.* at 2258 ("The United States has maintained complete and uninterrupted control of the bay for over 100 years."); *id.* at

2261 ("In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."); *id.* at 2262 (describing Guantanamo Bay as "territory that, while technically not part of the United States, is under the complete and total control of our Government"). Here, by contrast, the United States lacked both sovereignty and practical control over the property at issue. According to the complaint, it was the government of Uzbekistan, not the United States, that owned the land on which petitioner's cafeteria was located and that carried out the destruction of the cafeteria. Pet. App. 50, 52, 56. Thus, both the "formal legal status" and the "objective degree of control the United States asserted" over the property are dramatically different from *Boumediene* and do not support application of the Just Compensation Clause. 128 S. Ct. at 2258.

Second, *Boumediene* concerned only the Suspension Clause of the Constitution, and it did not address the applicability of the Fifth Amendment. See 128 S. Ct. at 2244. The Court's application of its functional test for extraterritoriality was entirely focused on the Suspension Clause, see *id.* at 2259-2262, and the Court stated its holding narrowly: "We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay," *id.* at 2262. The Court in *Boumediene* did not overrule precedents governing the extraterritorial application of the Fifth Amendment. To the contrary, the Court reaffirmed the validity of *Eisentrager*; it simply distinguished that case, even as to the application of the Suspension Clause, on the ground that, unlike Guantanamo Bay, "the United States' control over the prison in [*Eisentrager*] was neither absolute nor indefinite." 128 S. Ct. at 2260. That observation highlights the continuing applicability of *Eisentrager*'s Fifth Amendment rul-

ing, especially in the circumstances presented here, because the United States had even less control over petitioner's cafeteria in Uzbekistan than it did over the prison in occupied Germany that was at issue in *Eisentrager*.

3. Petitioner asserts (Pet. 8-9) that the court of appeals "established a rigid rule" requiring foreign nationals pursuing a Fifth Amendment taking claim to have "some preexisting substantial connection with the United States." In fact, the court rejected petitioner's suggestion that it adopt a "blanket rule" that "the Fifth Amendment protects the foreign property of citizens of every foreign country without regard to their connections with the United States." Pet. App. 17. In rejecting that proposal, the court grounded its decision on petitioner's lack of "*any relationship*, business or otherwise, with the United States." *Ibid.* (emphasis added); see *id.* at 19 (noting "the absence of *any* allegation of a relationship between the plaintiff and the United States") (emphasis added). This Court has never held that a person in petitioner's circumstances—a foreign national with no connection whatsoever to the United States who claims a taking of property in a foreign country over which the United States had no sovereignty or control—is entitled to the protections of the Constitution.

Similarly misplaced is petitioner's suggestion (Pet. 9) that, under the decision below, foreign nationals could pursue takings claims "if they happened, fortuitously, to have some unrelated connection with the United States." The court of appeals did not adopt any such "arbitrary standard." Pet. 11. Because petitioner alleged no relationship at all with the United States, the court did not consider what type of relationship would be sufficient to allow an alien to bring a claim under the Just Compensa-

tion Clause. Nothing in the court's opinion support's petitioner's assertion (Pet. 13) that she would have been able to pursue her claim simply by alleging that she had "vacationed at Disney World."

4. Finally, petitioner (Pet. 13-15) asserts that it would not be impractical to apply the Just Compensation Clause extraterritorially. Because petitioner lacks any connection to the United States, the court of appeals had no need to consider that issue. But as the Court of Federal Claims observed, petitioner's complaint makes clear that practical considerations also weigh against her claim. Petitioner alleged that "Uzbekistan presents severe terrorist risks to U.S. interests," Pet. App. 53, and that "the U.S. Embassy in Tashkent was at risk of terrorist attack," *id.* at 54. Thus, as in *Eisentrager*, the United States "faced potential security threats" in Uzbekistan, as well as potential "friction with the host government," making extraterritorial application of the Fifth Amendment particularly inappropriate in this case. *Boumediene*, 128 S. Ct. at 2261; see Pet. App. 41 n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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